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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

3 Arthur Gregory Lundeen, IV and Audra
4 Marie Lundeen,

5 Plaintiffs

6 v.

7 Bank of New York Mellon Corporation, as
8 Trustee for the Certificate Holders of the
9 CWALT, Inc., Alternative Loan Trust 2006-
10 40TI, Mortgage Pass-Through Certificates,
11 Series 2006-40TI,

12 Defendant

Case No.: 2:17-cv-01981-JAD-CWH

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**Order Granting Motion to Dismiss with
Leave to Amend**

20 [ECF No. 12]

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22 Plaintiffs Arthur and Audra Lundeen sue the Bank of New York Mellon Corporation in
23 this removed action.¹ The Bank moves to dismiss this case and argues that the Lundeens have
24 not stated a claim upon which relief can be granted.² The Bank suspects that the Lundeens
25 allege a claim for breach of contract or wrongful foreclosure, or both. In responding to the
26 motion, the Lundeens clarify that they allege claims for breach of an oral contract and breach of
27 the implied covenant of good faith and fair dealing.³ I find that the Lundeens have not
28 sufficiently pled either of these claims for relief. So, I grant the Bank's motion to dismiss, but I
29 give the Lundeens leave to amend if they can plead true facts to cure the deficiencies identified
30 in this order.

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¹ ECF No. 1-2 (amended complaint).

² ECF No. 12.

³ ECF No. 16.

Discussion

A. Federal pleading and dismissal standards

The federal pleading rule requires every complaint to contain “[a] short and plain statement of the claim showing that the pleader is entitled to relief.”⁴ While the rule does not require detailed factual allegations, a properly pled claim must contain enough facts to “state a claim to relief that is plausible on its face.”⁵ This “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”; the facts alleged must raise the claim “above the speculative level.”⁶ In other words, a complaint must make direct or inferential allegations about “all the material elements necessary to sustain recovery under *some* viable legal theory.”⁷

10 District courts employ a two-step approach when evaluating a complaint's sufficiency on
11 a Rule 12(b)(6) motion to dismiss. The court must first accept as true all well-pled factual
12 allegations in the complaint, recognizing that legal conclusions are not entitled to the assumption
13 of truth.⁸ Mere recitals of a claim's elements, supported by only conclusory statements, are
14 insufficient.⁹ The court must then consider whether the well-pled factual allegations state a
15 plausible claim for relief.¹⁰ A claim is facially plausible when the complaint alleges facts that
16 allow the court to draw a reasonable inference that the defendant is liable for the alleged

⁴ FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

²⁰ ⁵ *Twombly*, 550 U.S. at 570.

⁶ *Iqbal*, 556 U.S. at 678.

⁷ *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)) (emphasis in original).

²² ⁸ *Iqbal*, 556 U.S. at 678–79.

23 | ⁹ *Id.*

¹⁰ *Id.* at 679.

1 misconduct.¹¹ A complaint that does not permit the court to infer more than the mere possibility
2 of misconduct has “alleged—but not shown—that the pleader is entitled to relief,” and it must be
3 dismissed.¹²

4 **B. Applying these standards to the amended complaint**

5 The Lundeens allege that they “executed the subject Note and Deed of Trust relative to
6 real property located in Clark County, Nevada . . . or claims [sic] an interest in the property.”¹³
7 The Bank “is the servicer of the loan.”¹⁴ The Lundeens requested a loan modification under
8 NRS 107.086 and participated in two mediations under Nevada’s Foreclosure Mediation
9 Program, but neither was successful because the Bank allegedly failed “to comply with the
10 requirements of the mediation program.”¹⁵ The Bank later “filed a Writ of Execution on Real
11 Property as a Judgment Creditor against the property of the Plaintiffs” and a “Notice of Sheriff’s
12 Sale of Real Property Under Execution.”¹⁶ The notice stated that the property “was to be sold at
13 public auction on January 20, 2016[,] at 9:00 a.m.”¹⁷ Five days before the scheduled auction, the
14 Lundeens’ attorney “personally delivered” a written “Request for Mortgage Assistance” to the
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16¹¹ *Id.*

17¹² *Twombly*, 550 U.S. at 570.

18¹³ ECF No. 1-2 at ¶ 2.

19¹⁴ *Id.* at ¶ 3.

20¹⁵ *Id.* at ¶ 5.

21¹⁶ *Id.* at ¶ 6. The amended complaint is silent about how the Bank became a judgment creditor.
22 The Bank explains that it filed a judicial-foreclosure action in Nevada state court against the
23 Lundeens, and that the court entered judgment allowing the Bank to foreclose on the property on
December 9, 2014. The Bank provides copies of its complaint and the judgment that it obtained
in that case, and it asks me to take judicial notice of those court records under FRE 201. ECF
Nos. 12 at 4, 12-1 at 25–38. I take judicial notice of the existence of those court records and
their contents.

24¹⁷ ECF No. 1-2 at ¶ 6.

1 Bank's attorney.¹⁸ The two attorneys agreed that the Bank would delay the auction by 60 days
2 so that the Bank "could review [the Lundeens] for a loan modification."¹⁹ But the Lundeens
3 allege that the Bank never reviewed them for a loan modification and, without notice to the
4 Lundeens, sold their home at auction before the 60-day delay expired.²⁰ Based on these
5 allegations, the Lundeens pray for relief in the form of an order: (1) setting aside the sale of their
6 home; (2) requiring the Bank to deliver the deed of trust for their home to the court; (3)
7 cancelling the deed; (4) enjoining the Bank from removing the Lundeens from their home; and
8 (5) requiring the Bank to pay the Lundeens' attorney's fees and costs of suit.²¹

9 It is difficult to discern from this perfunctory and scattershot pleading what legal theory
10 the Lundeens allege entitles them to this relief. The Bank believes that the Lundeens allege a
11 claim for breach of contract and maybe a claim for wrongful foreclosure. The Lundeens clarify
12 in their response that they allege claims for breach of contract and breach of the covenant of
13 good faith and fair dealing.²² So, I consider only whether the Lundeens have shown that they are
14 entitled to relief for breach of contract or breach of the implied covenant of good faith and fair
15 dealing.

16 To state a colorable claim for breach of contract, the Lundeens must show (1) the
17 existence of a valid contract, (2) a breach by the Bank, and (3) damages sustained as a result of
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20¹⁸ *Id.* at ¶ 7.

21¹⁹ *Id.*

22²⁰ *Id.* at ¶¶ 7, 8.

23²¹ *Id.* at 4–5.

²² The Lundeens expressly refer to these claim forms in their response, but do not address the Bank's arguments about a possible claim for wrongful foreclosure. *See generally* ECF No. 16. I infer from the Lundeens' silence that they do not allege a claim for wrongful foreclosure.

1 the breach.²³ To adequately plead the first element of a breach-of-contract claim under FRCP 8
2 and Nevada law, the Lundeens must allege facts sufficient to show that it is plausible that there
3 was an offer and acceptance, meeting of the minds, and consideration.²⁴ The Bank argues that
4 that this claim is deficiently pled because the Lundeens don't allege that it was supported by
5 consideration. I agree.

6 “Consideration is the exchange of a promise or performance, bargained by the
7 parties.”²⁵ The failure to tender consideration prohibits the formation of a valid contract.²⁶ The
8 Lundeens allege that they asked the Bank to consider them for a loan modification and to delay
9 the public auction of their home by 60 days, but they don't allege that they promised or
10 performed anything in return. The Lundeens provide a little more detail about what transpired in
11 their response to the dismissal motion, but they do not argue that they can plead true facts to
12 show that they gave anything in exchange for the Bank's alleged promises. The Lundeens
13 explain that this was a “procedural deal” between the parties' attorneys,²⁷ which I infer to mean
14 that the Bank merely extended a professional courtesy to the Lundeens.

15 The Lundeens have not alleged facts sufficient to show that it is plausible that a legally
16 enforceable contract exists between them and the Bank. This pleading deficiency is fatal to both
17 of the legal theories that the Lundeens contend they allege because the existence of a valid
18 contract is an essential element of a claim for breach of the implied covenant of good faith and
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21²³ *Richardson v. Jones*, 1 Nev. 405 (1865).

22²⁴ *See May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005).

23²⁵ *Cain v. Price*, 415 P.3d 25, 28 (Nev. 2018) (quoting *Jones v. SunTrust Mortg., Inc.*, 274 P.3d 762, 764 (Nev. 2012)).

24²⁶ *Serpa v. Darling*, 810 P.2d 778, 781 (Nev. 1991).

25²⁷ ECF No. 16 at 5.

1 fair dealing.²⁸ The claim for breach of the implied covenant of good faith and fair dealing also
2 fails because the Lundeens have not specifically alleged that claim.

3 The Lundeens ask for leave to amend if the court perceives that their amended complaint
4 is deficient. The Lundeens' description of what transpired forecloses their ability to plead true
5 facts to show that there was a bargained-for exchange of consideration. But they can overcome
6 this obstacle if they can plead true facts to invoke “[t]he doctrine of promissory estoppel, which
7 embraces the concept of detrimental reliance” and “is intended as a substitute for consideration .
8 . . .”²⁹

9 Conclusion

10 Accordingly, IT IS HEREBY ORDERED that the Bank's motion to dismiss [ECF No.
11 12] is GRANTED. IT IS FURTHER ORDERED that the Lundeens have leave to amend their
12 pleading to cure the deficiencies identified in this order. **The Lundeens must file their**
13 **amended pleading by June 12, 2018.** If they fail to file an amended complaint by this deadline,
14 the court will construe that failure as the Lundeens' recognition that they cannot plead a viable
15 claim, and this case will be closed without further prior notice.

16 Dated: May 29, 2018



17 U.S. District Judge Jennifer A. Dorsey

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22²⁸ *See Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007) (“It is well established that all contracts
23 impose upon the parties an implied covenant of good faith and fair dealing, which prohibits
arbitrary or unfair acts by one party that work to the disadvantage of the other.”).

24²⁹ *Vancheri v. GNLV Corp.*, 777 P.2d 366, 369 (Nev. 1989).